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Rahanny Rojela v Public Prosecutor

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COURT OF APPEAL (KOTA KINABALU) — APPEAL NO S-05–218–08 OF 2014
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
5 OCTOBER 2016

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Accused charged for murder — Deceased died due to stab wounds on chest — Whether act of self-defence — Accused convicted for offence and sentenced to death — Whether lack of mens rea to commit murder — Whether failure of prosecution to call material persons — Whether trial judge sufficiently appreciated defence of accused — Penal Code s 302

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The appellant was charged at the High Court for the offence of murder under s 302 of the Penal Code. The appellant and the deceased attended a birthday party held by PW5. During the party, the appellant got involved in an argument with another person and the deceased managed to persuade the appellant not to continue with the argument. The appellant was unhappy with the deceased as he felt that the deceased had reprimanded him in front of the crowd at the party. Both of them later argued and quarrelled. They were asked by PW5 to leave the party. They left the party and returned to their respective quarters. Later, the appellant went to the deceased's house with a knife tugged at his waist and approached the deceased. At that time, both the deceased and PW6 were chatting in front of the deceased's quarters. The appellant took the knife from his waist and attempted to stab the deceased but the deceased managed to thwart the attack. The deceased then ran towards the main gate while being chased by the appellant. Unfortunately, the deceased stumbled and fell down near the main gate. The appellant came and sat on top of the deceased and stabbed him a few times at the deceased's chest. PW6 testified that he witnessed the incident from the distance of about 40 meters. The appellant fled through the main gate. The deceased was then rushed to the hospital but died on the way. Based on the post mortem report, the cause of death was stab wounds on the chest. At the end of the prosecution's case, the learned trial judge had called upon the appellant to enter his defence as he was satisfied that the prosecution had established a prima facie case against the appellant. The defence set up by the appellant was one of self-defence. Having considered the defence evidence as adduced by the appellant, the learned trial judge convicted the appellant as he had found that the evidence adduced by the appellant did not raise any reasonable doubt on the prosecution's case. He had then proceeded to convict the appellant and sentenced him to the mandatory death sentence by hanging. Aggrieved by the decision of the trial judge, the appellant

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filed an appeal against both the conviction and sentence on the grounds that there was lack of mens rea to commit murder; there was failure of the prosecution to call persons whose evidence was material but was not adduced; and the trial judge to failed to sufficiently appreciate the defence of the appellant.

Held, dismissing the appeal:

(1) Mens rea simply means the guilty mind to commit a crime. Unless an offence is of a nature of a strict liability offence, where a mere commission of an impugned act is sufficient to constitute such offence, the general rule in criminal jurisprudence has always been, and still is, that such an impugned act must have been actuated by the necessary mens rea or commonly understood as the guilty mind. Murder, as defined under the Penal Code, is not a strict liability offence and as such, requires as an integral proof of it, the proof by evidence of the accused person's guilty mind. The mere proof of actus reus of having killed the deceased is never sufficient (see para 13).

(2) The trial judge had assessed the evidence of SP5 and SP6 and he found them as reliable and credible witnesses whose evidence he had preferred to that of the appellant's pertaining to what had transpired on that fateful night. SP5 and SP6 were not accomplices to the offence that was allegedly committed by the appellant. That having been said, there was therefore no legal duty imposed on the trial judge to look for independent corroboration in support of their evidence. He was at liberty to either accept or reject their evidence based on his appreciation of the evidence adduced by SP5 and SP6 respectively (see para 25).

(3) The aggressor in this fatal incident was actually the deceased. This fact was used to advance his case that the appellant was in fact exercising his right of self-defence in the face of the alleged attacks mounted against him by the deceased at the material time. It all culminated when the appellant 'accidentally' stabbed the deceased with the knife, being the murder weapon, in his abdomen area. After that, the appellant fled the scene and was later arrested by the police, who had acted upon a police report having been lodged on the incident. The professed defence was therefore one of self-defence. Having done that, the trial judge went on to appreciate the defence put forth by the appellant who testified under oath. In so doing, he assessed the inherent probabilities of the appellant's version of the event and also against the evidence of the prosecution's witnesses. There was nothing amiss in the approach undertaken by the learned trial judge (see paras 32 & 34).

[Bahasa Malaysia summary

Perayu telah dipertuduh di Mahkamah Tinggi untuk kesalahan membunuh di bawah s 302 Kanun Keseksaan. Perayu dan si mati menghadiri majlis hari jadi yang diadakan oleh PW5. Semasa majlis, perayu terlibat dalam satu pertengkaran dengan orang lain dan si mati berjaya memujuk perayu untuk tidak terus bertengkar. Perayu tidak berpuas hati dengan si mati kerana dia merasakan bahawa si mati telah menegurnya di hadapan khalayak ramai di majlis tersebut. Mereka kemudiannya bertikam lidah dan bertengkar. Mereka diminta oleh PW5 untuk meninggalkan majlis. Mereka meninggalkan majlis dan pulang ke kuarters masing-masing. Kemudian, perayu pergi ke rumah si mati dengan pisau tersisip di pinggangnya dan mendekati si mati. Pada masa itu, si mati dan PW6 sedang berbual di hadapan kuarters si mati. Perayu mengambil pisau dari pinggangnya dan cuba untuk menikam si mati tetapi si mati berjaya mengelakkan serangan itu. Mangsa kemudian berlari ke arah pintu utama ketika sedang dikejar oleh perayu. Malangnya, si mati tersandung dan jatuh berhampiran pintu utama. Perayu datang dan duduk di atas si mati dan menikamnya beberapa kali di dada si mati. PW6 memberi keterangan bahawa dia menyaksikan kejadian itu dari jarak kira-kira 40 meter. Perayu melarikan diri melalui pintu utama. Mangsa kemudiannya dikejarkan ke hospital tetapi meninggal dunia dalam perjalanan. Berdasarkan laporan bedah siasat, punca kematian adalah kesan tikaman di dada. Pada akhir kes pendakwaan, hakim perbicaraan yang bijaksana telah memanggil perayu untuk membela diri kerana beliau berpuas hati bahawa pihak pendakwaan berjaya membuktikan kes prima facie terhadap perayu. Pembelaan yang dibangkitkan oleh perayu adalah mempertahankan diri. Setelah mempertimbangkan bukti pembelaan seperti yang dikemukakan oleh perayu, hakim perbicaraan yang bijaksana menyabitkan perayu kerana beliau mendapati bahawa keterangan yang dikemukakan oleh perayu tidak menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Beliau kemudian meneruskan untuk menyabitkan perayu dan menjatuhkan hukuman mati mandatori secara gantung. Terkilan dengan keputusan hakim perbicaraan, perayu memfailkan rayuan terhadap kedua-dua sabitan dan hukuman atas alasan bahawa terdapat kekurangan mens rea untuk melakukan pembunuhan; terdapat kegagalan pihak pendakwaan untuk memanggil orang yang keterangannya adalah material tetapi tidak dikemukakan; dan hakim perbicaraan gagal untuk menghargai pembelaan perayu secukupnya.

Diputuskan, menolak rayuan:

(1) Mens rea bermakna minda bersalah untuk melakukan jenayah. Melainkan kesalahan tersebut adalah bersifat kesalahan liabiliti ketat, di mana hanya dengan melakukan tindakan yang dipersoalkan mencukupi untuk membentuk kesalahan tersebut, peraturan umum dalam perundangan jenayah selalunya, dan sentiasa, bahawa perbuatan yang dipersoalkan perlu digerakkan oleh mens rea atau biasanya difahami

sebagai minda yang bersalah. Pembunuhan, seperti yang ditakrifkan di bawah Kanun Keseksaan, bukanlah satu kesalahan liabiliti ketat dan oleh itu, memerlukan sebagai bukti penting daripadanya, bukti berkenaan bukti fikiran bersalah orang yang tertuduh. Bukti actus reus semata-mata membunuh si mati adalah tidak mencukupi (lihat perenggan 13).

(2) Hakim perbicaraan telah menilai keterangan SP5 dan SP6 dan beliau mendapati mereka sebagai saksi yang boleh dipercayai di mana keterangan mereka lebih disukai beliau berbanding perayu berkaitan dengan apa yang berlaku pada malam yang malang itu. SP5 dan SP6 tidak bersubahat dengan kesalahan yang didakwa dilakukan oleh perayu. Setelah mengatakan demikian, oleh itu tiada kewajipan undang-undang yang dikenakan ke atas hakim perbicaraan untuk mencari sokongan bebas untuk menyokong keterangan mereka. Beliau bebas untuk sama ada menerima atau menolak keterangan mereka berdasarkan penghargaan beliau terhadap keterangan yang dikemukakan oleh SP5 dan SP6 secara berasingan (lihat perenggan 25).

(3) Penyerang dalam kejadian maut ini sebenarnya adalah si mati. Fakta ini digunakan untuk memajukan kesnya bahawa perayu sebenarnya menggunakan haknya untuk mempertahankan diri dalam menghadapi serangan yang dikatakan dirancang terhadapnya oleh si mati pada masa material. Semuanya memuncak apabila 'secara tidak sengaja' perayu menikam si mati dengan pisau, iaitu senjata pembunuhan, di bahagian abdomennya. Selepas itu, perayu beredar dari situ dan kemudiannya ditangkap oleh pihak polis, yang bertindak selepas satu laporan polis dibuat mengenai kejadian itu. Pembelaan yang dinyatakan adalah mempertahankan diri. Setelah bertindak sedemikian, hakim perbicaraan meneruskan dengan menghargai pembelaan yang dikemukakan oleh perayu yang memberi keterangan bersumpah. Dengan berbuat demikian, beliau menilai kebarangkalian wujud versi peristiwa perayu dan juga terhadap keterangan saksi-saksi pendakwaan. Tiada apa yang tidak kena dalam pendekatan yang diambil oleh hakim perbicaraan yang bijaksana (lihat perenggan 32 &34).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16; [1985] CLJ Rep 19, SC (refd)
Alcontara a/l Ambrose v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Ikau anak Mail v PP [1973] 2 MLJ 153; [1973] 1 LNS 51, FC (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ Rep 221, SC (refd)
Musa bin Yusof v PP [1953] MLJ 70, CA (refd)
(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336; [1987] CLJ Rep 241, SC (refd)
PP v Ngoi Ming Sean [1982] 1 MLJ 24 (refd)
Rajapakse Pathurange Don Jayasena v The Queen [1970] AC 618, PC (refd)
Subramaniam v PP [1956] 1 MLJ 220; [1956] 1 LNS 115, PC (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132; [1982] CLJ Rep 340, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151, CA (refd)

Legislation referred to

Criminal Procedure Code s 277
Evidence Act 1950 ss 60, 114(g)
Penal Code ss 299, 300, 302, 304(a)

Appeal from: Criminal Trial No S-05–218–08 of 2014 (High Court, Tawau)

Abdul Gani Zelika (Johari & Zelika) for the appellant.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

THE CHARGE

[1] The charge against the appellant was as follows:

> Bahawa kamu pada 30/04/2010 lebih kurang jam 12.30 malam bertempat di Sepangar Shipyard, Jalan Kastam Baru, Lahad Datu, dalam Daerah Lahad Datu telah menikam penama Teto Chang @ Reubes Mirontos, L/23 Tahun, B/ Visaya, Pasport: XX3824036 sehingga menyebabkan kematian. Oleh itu, kamu telah melakukan kesalahan yang boleh dituduh dibawah Seksyen 302 Kanun Keseksaan.

BRIEF FACTS OF THE CASE

[2] The facts relevant to this appeal as narrated by the learned trial judge are briefly as follows:

a. On 30 April 2010, Yusman bin Adam (PW5) had organized a party at his house to celebrate his child's birthday. PW5 invited few guests including Teto Chang @ Reubes Mirontos (the deceased), Rahanny Rojela (the Appellant), Rizmar bin Ras (PW6), some Visayas and few other workers from Sepanggar Shipyard Sdn Bhd. At the birthday party, PW6 was asked

by PW5 to help him at the kitchen. As the party progressed, a karaoke session took place and two tables were arranged for those who wanted to continue drinking and singing. Later, the appellant got involved in an argument with a Timorese. The deceased managed to persuade the Appellant not to continue with the argument.

b. The Appellant however, was unhappy with the deceased as the Appellant felt that the deceased had reprimanded him in front of the crowd at the party. Both of them later argued and quarrelled. PW5 calmed them down and asked them to leave the party. After that, they left the party and return to their respective quarters. Later, the Appellant went to the deceased's house with a knife tugged at his waist and approached the deceased and PW6. At that time, both the deceased and PW6 were chatting in front of the deceased's quarters. The Appellant took the knife from his waist and attempted to stab the deceased but the deceased managed to thwart the attack.

c. The deceased then ran toward the main gate while being chased by the Appellant. Unfortunately, the deceased stumbled and fell down near the main gate. The Appellant came and sat on top of the deceased and stabbed him a few times at the deceased's chest. PW6 testified that he witnessed the incident from the distance of about 40 meters. The place of the incident was lit by the lighting outside and the lamp post nearby. The Appellant fled through the main gate. The deceased was then rushed to the hospital with the help of PW6 and one Lolong. However the deceased died on the way to the hospital.

d. Based on the post mortem report (P27) prepared by Dr Jessie Hiu (PW2), the cause of death is stab wounds on the chest.

FINDINGS OF THE LEARNED HIGH COURT JUDGE

[3] At the end of the prosecution's case, the learned trial judge had called upon the appellant to enter his defence as he was satisfied that the prosecution had established a prima facie case against the appellant for the offence as per the charge.

[4] The defence set up by the appellant was one of self-defence. Having considered the defence evidence as adduced by the appellant, the learned trial judge had convicted the appellant as he had found that the evidence as adduced by the appellant did not raise any reasonable doubt on the prosecution's case. He had then proceeded to convict the appellant and sentenced him to the mandatory death sentence by hanging.

[5] Being aggrieved by the decision of the learned trial judge, the appellant had since filed in his notice of appeal against both the conviction as well as sentence. We heard the appeal on 18 July 2016 at Kota Kinabalu, Sabah.

THE APPEAL

[6] Before us, learned counsel for the appellant raised four issues for our consideration. Those issues had been:

(a) the lack of mens rea to commit murder;

(b) the failure of the prosecution to call persons whose evidence was material but was not adduced;

(c) the error on the part of the trial judge in admitting admissible evidence; and

(d) the failure on the part of the trial judge to sufficiently appreciate the defence of the appellant.

[7] Having considered the records of appeal as well as the oral and written submissions by both learned counsel and learned deputy, we had dismissed this appeal. We now proffer our reasons for having so decided.

[8] We will address the issues as raised by learned counsel for the appellant in turn.

[9] As to the contention by the defence that the evidence as led by the prosecution had failed to prove the necessary mens rea that is required to prove murder, we noted that such contention was premised on the argument that the injuries that were sustained by the deceased were caused by the appellant in a sudden fight. It was submitted before us that the conviction under s 302 of the Penal Code for murder ought to be set aside and the sentence of death by hanging entered against the appellant be set aside as well. A lesser offence of culpable not amounting to murder under s 304(a) of the Penal Code ought to be recorded against the appellant.

[10] Before the learned trial judge that was put forth, the defence erected by the appellant was one of self-defence. Indeed, it was even suggested, though not too explicitly, that the injury was caused by him by accident. We reproduce his evidence as follows:

> Lepas itu tiba-tiba dia terjatuh. Aku tidak apa sebab dia terjatuh. Itu pisau terlimpar di depan saya. Jadi dia bangun berdiri mungkin mahu ambil balik itu pisau. Tapi saya ambil dulu itu pisau. Saya duduk apabila dapat itu pisau. Lepas itu Teto [the deceased] pegang saya punya kepala dan tolak kepala saya. *Saya punya tangan ternaik memegang pisau, sebab saya ditolak. Kena dia di bahagian perut.* Lepas itu dia undur, duduk pegang dia punya perut. Lepas itu saya bangun berdiri lari keluar gate. (See record of appeal p 237.)

[11] From the part of the above quote in italics, it would appear that he had caused the injury to the deceased's stomach by accident as could be deduced from the use of the words 'Saya punya tangan ternaik memegang pisau, sebab saya ditolak. Kena dia di bahagian perut'. In particular, the word 'ternaik' which would ordinarily convey the meaning that his hand was unintentionally raised, and that it was not of his own free volition. But a perusal of the records of appeal had shown that the appellant did not pursue this line of defence. His defence was one of self-defence.

[12] Under the law, self-defence as a defence, being a general defence under the Penal Code, would afford a complete defence altogether, and if successfully mounted by the appellant, would entitle him to an acquittal from the charge. The appellant had a legal burden to prove on the balance of probabilities that his act was self-defence (see *Rajapakse Pathurange Don Jayasena v The Queen* [1970] AC 618; *Ikau anak Mail v Public Prosecutor* [1973] 2 MLJ 153; [1973] 1 LNS 51).

[13] The necessary mens rea required of murder is to be found in either the proof of the intention or knowledge as described under the four limbs as expressed in s 300 of the Penal Code. Mens rea simply means the guilty mind to commit a crime. Unless an offence is of a nature of a strict liability offence, where a mere commission of an impugned act is sufficient to constitute such offence, the general rule in criminal jurisprudence has always been, and still is, that such an impugned act must have been actuated by the necessary mens rea or commonly understood in the English language as the guilty mind. Murder, as defined under the Penal Code, is not a strict liability offence and as such, requires as an integral proof of it, the proof by evidence of the accused person's guilty mind. The mere proof of actus reus of having killed the deceased is never sufficient.

[14] Causing unlawful death of a person may not necessarily amount to murder. Under s 299 of the Penal Code, if death is caused to a person pursuant to a sudden fight, it will amount to what in law is known as culpable homicide not amounting to murder. This was what learned counsel for the appellant had tried to impress upon us what his client had in fact committed. This, despite the fact that the defence that was raised in the trial before the learned trial judge was self-defence.

[15] It was also impressed upon us by learned counsel for the appellant that the prosecution had failed to lead evidence that ought to come from certain persons whom it had failed to call to testify. In other words, learned counsel was urging us to invoke adverse inference against the prosecution for having so failed.

[16] Now, adverse inference is contained in s 114 illustration (g) of the Evidence Act 1950. The law as contained under that provision reads:

> The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[17] As to when an invocation of such adverse inference can be had is very much a mixed question of fact and law-driven exercise. To our mind, three decisions of our apex court provide a very clear guide as to how adverse inference may be invoked and drawn against the Prosecution in a criminal trial. The first case is the decision of the then Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ Rep 221. In that case, Mohd Azmi Kamaruddin SCJ speaking for the apex court had held that not all failures to adduce evidence by the prosecution must attract the operation of the adverse inference rule under s 114 illustration (g) of the Evidence Act 1950. To qualify for such invocation, the court must be convinced that the prosecution has been guilty of suppressing material evidence. to quote the learned justice, he had said:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[18] Therefore, essentially, only suppression of the material evidence by the prosecution may lead to the invocation by the court that such evidence, if adduced by the party suppressing it, would have the effect of being adverse against it. In other words, it must be a deliberate act on the part of the prosecution to deny justice by withholding material witness. Nothing short of that would suffice for the court to trigger the presumption of adverse inference against the prosecution, bearing in mind the totality of the evidence then already adduced before the court.

[19] The operation of the application of that rule pertaining to adverse inference is further illustrated in the case of *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] CLJ Rep 241. In the speech by learned Justice Syed Agil Barakbah SCJ on behalf of the then Supreme Court, he had occasion to say the following:

> Clearly, Francis was a *participes criminis*, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under s 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of the overwhelming prosecution evidence as stated earlier, we do

A not think that the presence of Francis, had he been available, would have made any difference.

B **[20]** To our mind, inherent in the conclusion of the Supreme Court in the *Namasiyam*'s case in so far as the evidence of Francis was concerned, is that to call Francis would be an overkill/superfluous, as the prosecution's case, as it then stood without Francis's evidence, was already strong on its own account. On the same token, the omission to call Francis, would also not mean anything adverse to the prosecution's case. Therefore, with or without the evidence from a material witness that was admittedly Francis, nothing was subtracted from the total sum of the prosecution's case, and much less, anything was added thereto. In other words, his evidence would, at its highest be termed as a neutral. Nothing of value was added to nor subtracted from, in terms of the prosecution's case, on account of his omitted evidence. As one is apt to say, it would contribute nothing material to the discussion already had.

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[21] From the excerpt of the speech as quoted above, the need to call a witness, however material he may be to the narrative of the prosecution case, his evidence may be dispensed with, provided that there is already adduced before the trial court, overwhelming evidence so as to render such material evidence redundant, and therefore no longer crucial in the context of the whole case for the prosecution.

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F **[22]** That now would bring us to the third case in the trilogy of the apex court's decisions related to this issue. That third case is the case of *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; [1985] CLJ Rep 19. The circumstances on the non-calling of a witness by the prosecution is finally tested by the all-important litmus test which all prosecution cases must overcome, namely that a failure to call a particular witness does not result in there being a material gap being created in the prosecution case. Granted that the prosecution has the discretion whether or not to call a particular witness, an omission to call a witness must not result in a material gap in its case. We reproduce the excerpt from the speech of Justice Salleh Abas LP in that *Abdullah Zawawi Omar*'s case like so:

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H Thus, our answer to the question for which we granted leave should be that the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

I **[23]** It is clear therefore that it is not an absolute rule that the prosecution must call all persons who may be acquainted with the facts of the case, including those from whom statements have been recorded, however material their evidence may appear to be. It is in law, a discretion which exercise is governed by certain set criteria which must be judiciously considered by the public prosecutor or his deputy, when faced with a challenge of this kind. The

paramount consideration is the duty to discharge the continuous legal burden of proof to establish his case beyond reasonable doubt throughout the entire case. In a criminal prosecution, that legal burden of proof never shifts. This is in consonance with the Latin maxim *semper neccessitas probandi incumbit ei qui agit* which in English would translate as 'the necessity of proof always lies with the person who lays charges'.

[24] Coming back to the attendant facts in this appeal, we noted that the complaint of the appellant had centred on the alleged failure by the prosecution to call as witnesses two persons who were allegedly acquainted with the material facts of this case. We could do no better than to reproduce the written submissions of the appellant to illustrate how this issue had been articulated by learned counsel in para 4 therein, like so:

> The second ground of appeal is that based on PW6 evidence, apart from him there are two other persons who were present and saw the said incident and the two persons were Lolong and Tahasan. (See page 97 line 572-582 ROA) However, the said person were not offered to the Appellant at the end of prosecution case. The evidence of the said two person are crucial so as to confirm and verify whatever evidence given by PW6 about the incident. There is no explanation offered by the prosecution of why the said two person are not called to give evidence or offered to the Appellant. In fact Lolong and Tahasan were also involved in identifying the Appellant during identification parade. PW6 gave evidence that Lolong can be seen in Photograph No: 7 in P39 and Tahasan in Photograph 9 of P39.

[25] From his grounds of judgment, it was clear to us that the learned trial judge had assessed the evidence of SP5 and SP6 and that he had found them as reliable and credible witnesses whose evidence he had preferred to that of the appellant's pertaining to what had transpired on that fateful night. It is worth reminding ourselves that SP5 and SP6 were not accomplices to the offence that was allegedly committed by the appellant. That having been said, there was therefore no legal duty imposed on the trial judge to look for independent corroboration in support of their evidence. He was at liberty to either accept or reject their evidence based on his appreciation of the evidence adduced by SP5 and SP6 respectively. As long as he had exercised his duty properly in accepting or rejecting their evidence on valid reasons, there is nothing that we, as appeal judges, can do in law to disturb his findings, even though we may be desirous of departing from the same. As long as he did not abuse the distinct opportunity that he had, of having the audio-visual advantage of personally observing the demeanour of the witnesses' first-hand, our hands are tied and no recourse can be had in the name of appellate intervention on our part. For this, we would cite the case of *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337 where learned Justice Mohd Ariff JCA had occasion to address the same issue, like so:

> ... It suffices to refer to the Federal Court decision in *Ming Holdings (M) Sdn Bhd v*

Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, where James Foong FCJ dealt with the applicable principles comprehensively, as follows: '[41] ... we feel a need to remind that a trial Judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial Judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial Judge. This 'plainly wrong' test has been long established and can be observed in the judicial committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 where Lord Fraser said: In the face of that finding by the trial Judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show. [42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial Judge. [43] The first is Lord Tankerton in Watt or *Thomas v Thomas* [1947] AC 484: (1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself as a Judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[26] We would hasten to add here that this role of the appellate court, such as this court, as was alluded to in the above paragraph, is applicable to all kinds of cases, be they civil or criminal cases. Before us, it had not been demonstrated to us by learned counsel that the learned trial judge had acted in a manner that had undermined the proper exercise by him of that distinct advantage which this court did not enjoy.

[27] As regards the complaint that the same two persons were involved in the identity parade, suffice it is to say that the identity of the appellant was never an issue. It was an issue of recognition, not identification. The appellant was not a total stranger to the witnesses. The witnesses knew the appellant. Both the protagonists in this case knew each other. They were guests in the same birthday party that was followed with a karaoke session. There were attempts to separate the two protagonists by the witnesses but to no avail. As such, the evidence on the identification parade assumed little revance in the context of this case. It, therefore, would follow that the fact that the two persons had participated in the identification parade of the appellant had been rendered a

non-issue, with due respect. So, nothing had turned on the failure to adduce such evidence by the prosecution that could be translated as being in favour of the appellant.

[28] As regards the issue concerning the wrongful admission of a certain piece of evidence alleged to be hearsay evidence, the complaint by the appellant was related to the evidence of SP13, Insp Mohamad Soffi bin Jalal, the investigating officer of this case. To be exact, the complaint premised on the rule against hearsay was related to the fact that a sketch plan which he had drawn was based on the information that he had received from other persons. In short, the contention of the appellant had been that that piece of evidence ought not to have been admitted in evidence at all.

[29] Now, that sketch plan was admitted and was marked as P37. Under the rule against hearsay, a piece of evidence would be caught by the rule if the witness tries to assert the truth of the information that he received from another person. The fact that he said he received that information from that person is admissible under s 60 of the Evidence Act 1950. He was only alluding to the factual circumstance that he came to know through one of his senses. The embargo that operates against him is if he attempts to say that what he had received from that person was the truth. P37 was admissible as SP13 had drawn it, but its contents if asserted to be the truth, being information emanating from other persons, would definitely be caught by the hearsay rule. The Privy Council's decision in the case of *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220; [1956] 1 LNS 115 is highly instructive in that regard.

[30] To a certain extent, at first blush, we saw some merit in the complaint of learned counsel. We then had occasion to inquire from him whether the learned trial judge had in his grounds of judgment relied on P37 in coming to his decision. To his credit, learned counsel was frank and candid enough to concede that there was no single reference made by the learned trial judge on P37 in his deliberation of the issues in his grounds of judgment. Upon further scrutiny by us, indeed there was none. As such, we were of the considered view that his mind was not swayed by P37 when the learned trial judge deliberated the evidence before him. His mind was not tainted by the otherwise inadmissible evidence contained in P37. It was quite apparent to us that he had relied on the oral testimonies of witnesses. Premised on that fact, we were of the view that there was no merit in learned counsel's complaint pertaining to P37. It was clear from the overall consideration of the entire grounds of judgment of the learned trial judge, P37 had played no role at all in his deliberation before coming to his decision in convicting the appellant as per the charge. We would have no difficulty in agreeing with learned counsel on this issue had the learned trial judge relied heavily on P37 before convicting the appellant. However, upon due perusal of the grounds of judgment of the learned trial judge we were

unable to find such reliance by him on P37. There was not an iota of evidence on the face of the grounds of judgment of the learned trial judge showing any such indication at all. He had before him the evidence of direct eye witnesses especially in SP6 and SP5 whom, as a trier of facts, the learned trial judge had accepted as truthful witnesses and whose evidence he had accepted as credible.

[31] The last complaint of the appellant had been premised upon his grievance that the learned trial judge had not sufficiently considered and appreciated his defence in the light of the overall evidence as adduced before the trial court.

[32] Looking as it were at the evidence led by the appellant, we could not but noticed that from his perspective, the aggressor in this fatal incident was actually the deceased. This fact was used to advance his case that the appellant was in fact exercising his right of self-defence in the face of the alleged attacks mounted against him by the deceased at the material time. It all culminated when the appellant 'accidentally' stabbed the deceased with the knife, being the murder weapon, in his abdomen area. After that, the appellant fled the scene and was later arrested by the police, who had acted upon a police report having been lodged on the incident. The professed defence was therefore one of self-defence.

[33] We now reproduce verbatim the relevant portions from the grounds of judgment of the learned trial judge as to how he had dealt with the defence case.

> The accused was called upon to enter his defence. The accused chose to give evidence on oath. His version is as follows. On 29.04.2010, the accused and together with his few friends went to PW5's house to celebrate a birthday party. When the guests were enjoying the party, they were startled by the sound of police vehicle siren which stopped at the front of the main gate. When the patrol vehicle left, a Timorese who was present at the party asked those who are present to run or hide if they do not have a passport. The deceased not happy with the remarks made by the Timorese, quarrelled with the Timorese and punched the Timorese on his face. The accused, then stopped the deceased from further hitting the Timorese. They were then asked to leave the party by PW5 and one named Panyung. But the Accused refused. He told Panyung that he wanted to hear the karoke session. Later, the deceased came back to the party and approached the accused. He deceased told the accused that he was unhappy with the accused because the accused was trying to help the Timorese. The deceased then punched the accused on his chest. The deceased took the knife from the table and threatened to kill him. The accused stepped back to avoid being stabbed by the deceased and caught the deceased's hand and turn then pushed the knife to the deceased's direction. As a result, the deceased was injured his chest and the accused injured his right hand.
>
> The accused ran towards his house and the deceased chased him. The deceased managed to block the accused's path and reiterated his threat to kill the accused. The accused asked the deceased to stop fighting since both of them were injured. The

deceased refused to listen to the accused and threatened to kill the accused. The deceased attempted to stab the accused again, but he stumbled and fell. The accused quickly picked up the knife that was thrown out of the deceased's hand. The deceased pulled the accused's head from behind and the accused stabbed the deceased's abdomen. The accused later ran towards the main gate and left the place.

[34] Having done that, the learned trial judge went on to appreciate the defence put forth by the appellant who testified under oath. in so doing, he assessed the inherent probabilities of the appellant's version of the event and also against the evidence of the prosecution's witnesses. We saw nothing amiss in the approach undertaken by the learned trial judge.

[35] The learned trial judge observed that the appellant did not put his defence to the relevant prosecution's witnesses. At p 39 of his grounds of judgment, he had stated:

The accused did not put the defence case at the prosecution stage. As I have said the accused's version is totally different with the prosecution's version of this case. For a defence to be complete and believable defence, it has to be put at the appropriate stage of the trial. In other words, the defence should be put or suggested to the prosecution's witness during the cross-examination. For this I note that the accused did not suggest to PW2 that the accused was injured in the stomach. Neither was this pursued with vigour during the cross-examination of PW6. The relevant law on this issue is in the case of *Tan Kim Ho v Public Prosecutor* [2009] 3 MLJ 151.

[36] In the course of his appreciation of the appellant's defence, the learned trial judge had cited the case of *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151 as an authority for the proposition that it is the duty of the accused person to bring out his case during the prosecution's case. This duty is not merely a technical rule, but more importantly, it is premised on the due consideration of substantive justice. It avoids the element of surprise by ambush by the adverse party and it provides for an opportunity for the opponent's witnesses confronted with the pertinent questions on the defence, to answer and reply to the issues raised by the adverse party during their cross-examination. The learned trial judge had in his grounds of judgment made a remark that the defence of the appellant had smacked of an afterthought. Such remark cannot be simply dismissed as being unjustified because the evidence of the appellant during defence stage had shown that some crucial issues that formed part of the defence were not asked of the relevant prosecution's witnesses when they were giving evidence on the witness stand during the prosecution case. To quote *Browne v Dunn* (1893) 6 R 67 (HL) the *locus classicus* for the legal proposition that if a litigating party does not accept the evidence of the adverse party that was given during the course of his examination-in-chief, then it becomes an incumbent duty on him to challenge such evidence coming from the adverse party during cross-examination of the witness of the adverse party. Failure to do so would, in law amount to an

admission or an acceptance of that factual circumstance as alluded to in his unchallenged evidence.

[37] To our mind, the principle in the case of *Browne v Dunn* was succinctly explained by Justice Mukerji from the Indian High Court of Calcutta, in the equally oft-cited case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 where His Lordship had said that this rule was not a mere technical rule, but more than that, it was a substantive rule of justice:

> The law is clear on the subject. Wherever the opponent has declined to avail himself to put his essential and material case in cross-examination, it must follow that he believed the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[38] The learned trial judge had also correctly cited the case of *Alcontara a/l Ambrose v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 on the same issue.

[39] The learned trial judge then had proceeded to conclude on this issue of non-putting of the appellant's case in the following terms as can be seen at p 41 of his grounds of judgment, like so:

> After going through the notes of proceedings on the cross-examination of PW2 and PW6, in my view, the defence has failed to put his defence. It is only when the accused gave his testimony that he brought in 'defence' which is different from PW6's testimony that he had stabbed the deceased on his abdomen and not the deceased's chest. This part of evidence, in my view, is very crucial to determine whether the accused is acting on self-defence or has the intention of killing the deceased.

[40] However, the learned trial judge did not stop there. we noted that having so ruled that the defence of the appellant had smacked of an afterthought, the learned trial judge still proceeded to consider the appellant's evidence in relation to his defence and whether such defence was plausible. We noted that he had cited the judgment of Ajaib Singh in the case of *Public*

Prosecutor v Ngoi Ming Sean [1982] 1 MLJ 24 which clearly outlined the legal parameters of the defence of self-defence. Again, we had no reason to disagree with his approach. The law allows for a person under valid apprehension of fear that grievous harm may be caused to him by another, to take whatever necessary steps to thwart any attacks on him in self-defence. The Court of Appeal in the case of *Musa bin Yusof v Public Prosecutor* [1953] MLJ 70 had described the scope of self-defence succinctly as follows:

> The question in such cases is not whether there was an actual continuing danger, but whether there was a reasonable apprehension of such danger. If such a condition exists, the person attacked is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is justifiable.

[41] But the exercise of that right must 'cease and is no longer available when there is no more apprehension of danger to the body'. The defence must be commensurate with the offense. An exercise in the name of self-defence is not a licence to inflict more harm to the aggressor than was necessary to overcome the danger. Such defence is premised on self-preservation of one's own safety, through self-help by taking reasonable and appropriate measures that are commensurate with the apprehension of danger that he is being faced with.

[42] The learned trial judge had found the appellant was not credible. he had cited instances where his evidence was not consistent. He said that he did not believe the appellant's version of what had really transpired on that night after the birthday party and ensuing karaoke session had ended. From a perusal of the evidence of the appellant we had noted that he had stated that in the course of the alleged struggle between him and the deceased, he had caused injuries to the deceased in his abdomen region, as though by accident. A subsequent post mortem that was conducted by the pathologist had revealed that there were no injuries suffered by the deceased in his abdomen region. It must be recalled that the evidence of the pathologist must be regarded as independent and objective evidence made by a witness who had no personal knowledge of both the appellant and the deceased. Surely the pathologist had no axe to grind against the appellant. As such, her evidence did not suffer from any suspicion whatsoever which may cast aspersion as to its credibility. Such evidence emanating from the pathologist was indeed weighty in its own right.

[43] The significance of the pathologist's evidence on the non-injuries caused or found at the abdomen of the deceased had been that it had exposed the lie by the appellant. A lie by an accused person can, in law, be used as a corroboration that he was a liar, and therefore not a witness of truth and therefore lacking in credibility. In this regard, we needed only to cite the case of *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132; [1982] CLJ Rep 340 where learned Justice Salleh Abas FJ (as he then was)

had this to say, on behalf of the apex court:

> In other jurisdictions, a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had the opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade v The King* [1924] 34 CLR 154 and also *Regina v Lucas* [1981] 3 WLR 120 also *R v Tripodi* [1961] VR 186. We accept the decisions in these cases to be good law. In this case, we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such a lie is a reflection of his consciousness of guilt as regards the use he intended to make of the car in question.

[44] Applying the principle above in the context of this appeal before us, when the appellant said that he had struck at the abdomen region of the deceased, he was telling a deliberate lie. He was trying to exculpate himself from being accountable for the three stab wounds that were sustained by the deceased in his chest that had penetrated his lung and severed an artery that had led to the excessive internal bleeding, resulting in the deceased suffering from hypovolemic shock and from which he had succumbed to his injuries. He had failed to explain apparent 'untruth' pertaining to the so-called injuries (which were non-existent) at the abdominal region of the deceased, in his testimony, during the trial. Such a lie is a reflection of his consciousness of guilt, to borrow the words of the apex court justices in the *Syed Ali*'s case. The independent evidence from the pathologist had exposed the appellant's lie for what it actually was. The learned trial judge was justified in preferring the testimonies of SP5 and SP6 to that of the appellant.

[45] Having appreciated the defence of the appellant's, the learned trial judge concluded as follows:

> I do not believe that the accused was exercising his right of self-defence under a reasonable apprehension that death or grievous hurt would be caused to him by the deceased. The Accused, in his testimony, testified that when the deceased fell down, the deceased was no longer holding the knife. Subsequently the Accused picked up the knife. At this material point, the Accused was not under any reasonable apprehension that he would die or be injured as he was in possession of that knife. He had the opportunity to flee from the place and runaway. Instead, he choose to stay put at the place of the incident. Although he testified that the deceased had pulled his head from behind, I do not think that the deceased could have more harm to the Accused due to the injuries already sustained by him.

[46] Surely, the learned trial judge had followed the guideline as laid down by learned Justice Suffian J (as he then was) in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263. In his penultimate paragraph in his grounds of judgment, he had said:

Taken the testimony of the accused in its totality I do not find the accused version of events that happened that night to be credible. He has not cast any doubt on the prosecution's case.

[47] The learned trial judge found that the appellant had failed to raise a reasonable doubt on the prosecution's case. From the evidence adduced by the witnesses for the prosecution, the act of killing the deceased by the appellant was one that had amounted to murder. The fatal injuries suffered by the deceased were inflicted by the appellant and they were inflicted at a critical part of the deceased's anatomy, to wit, his chest within which the delicate organs such as the lungs were situated. Indeed, the pathologist's evidence on the nature of the wounds caused by stab wounds was clear in terms of them being fatal on the deceased. An intention to kill can be readily inferred under the circumstances. We had no reason to conclude differently from the learned trial judge's finding. Also, this case was not a fit and proper case whereby s 304(a) of the Penal Code could be invoked in favour of the appellant.

[48] Looking at how extensively the learned trial judge had considered the appellant's defence, we were unable to accede with the defence counsel's complaint that the learned trial judge did not appreciate the appellant's defence sufficiently. On the contrary, he had in his grounds of judgment demonstrated more than amply that he had addressed the entire evidence before him and the applicable legal principles pertaining to the appellant's defence as was required of him under the law. At its highest, the evidence by the appellant had not raised a reasonable doubt as to his guilt. We saw no merit in the appellant's complaint in that regard.

[49] Clearly to our mind, the learned trial judge had not misdirected himself on the attendant burden of proof on the appellant which he had had to discharge in order for the latter to gain an acquittal from the charge. That burden, as was rightly found by the learned trial judge was not successfully discharged by the appellant. The appellant had also failed to raise a reasonable doubt on the prosecution's case.

[50] Therefore, to recap, we had dismissed this appeal as we were not convinced that there was any merit in the arguments put forth by learned counsel on behalf of the appellant. We did not see any appealable error having been committed by the learned trial judge which would otherwise require our appellate intervention. The prosecution had proven its case beyond reasonable that the appellant was guilty of the murder of Teto Chang @ Reubes Mirontos as per the charge. Premised on that, we had therefore, affirmed the conviction and sentence entered against the appellant by the learned trial judge. The appellant was ordered to be hung by the neck until he was dead in consonance with s 277 of the Criminal Procedure Code. So ordered.

A *Appeal dismissed.*

Reported by Afiq Mohamad

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